

Montana Transportation Commission

June 5, 2007 Meeting

*MDT Commission Room
2701 Prospect Avenue
Helena, MT*

IN ATTENDANCE

Bill Kennedy, Transportation Commission Chair
Kevin Howlett, Transportation Commissioner
Rick Griffith, Transportation Commissioner
Nancy Espy, Transportation Commissioner
Dee Winterburn, Transportation Commissioner
Dave Ohler, Attorney for the Commission
Jim Lynch, MDT Director
Jim Currie, MDT Deputy Director
Loran Frazier, MDT Engineering
Tim Reardon, MDT
Nick Rotering, MDT
Carol Grell Morris, MDT
Rick McAlmond, Lamar Outdoor Advertising
Paul Dennehy, Lamar Outdoor Advertising
Joe Mazurek, Crowley Law Firm
Ted Burch, FHWA
Lori Ryan, MDT

Please note: the complete recorded minutes are available for review on the commission's website at http://www.mdt.mt.gov/pubinvolve/trans_comm/meetings.shtml. You may request a compact disc (containing the audio files, agenda, and minutes) from the transportation secretary Lori Ryan at (406) 444-7200 or lravn@mt.gov. Alternative accessible formats of this document will be provided upon request. For additional information, please call (406) 444-7200. The TTY number is (406) 444-7696 or 1-800-335-7592.

OPENING – Chairman Bill Kennedy

Chairman Bill Kennedy called the special meeting to.

Agenda Item 1: May 24, 2007 Bid Letting

Loran Frazier presented the bids for all twelve projects let in May. We received 23 bids. The average number of bids was only 1.9 per project.

Project No. 1: 40 km South of Ekalaka-South (Phase IV). There were three bidders. The apparent low was Prince Inc. with a bid of \$4,350,054.55. The Engineer's estimate was \$4,882,541.00; that is about 10.9% under our Engineer's estimate. We didn't have any issues with the bid. We recommend awarding it.

Chairman Kennedy asked if this was the Ekalaka project that was earmarked and we are doing half of it first. Director Lynch said yes they were spending the earmark that we have currently. We will need the rest of it to finish. Chairman Kennedy said when the project is done he would like to come down for the ribbon cutting.

Project No. 2. Glendive-Northeast -- NH project. There were four bidders. The apparent low is Prince Inc. with a bid of \$2,566,855.72. The Engineer's estimate was \$5,039,659.00. They are about 29% below our Engineer's estimate. We recommend award.

Project No. 3. Warm Spring Creek-20 km SW Hilger. This is a little bridge project. There were three bidders. The apparent low is Wickens Construction Company with a bid of \$2,238,122.12. The Engineer's estimate was \$2,731,673.00. They are about 18% below our Engineer's estimate. We recommend award.

Project No. 4. Montana CM 1550—Bike Ped Path in Whitefish. There was only one bidder. The apparent low is JTL Group Kalispell with a bid of \$2,795,036.85. The Engineer's estimate was \$1,429,295.00. They are about 95% above our Engineer's estimate. We went through the process that we go through to look at the Engineer's estimate to see if anything could be revised. We revised a couple of items which adjusted it to \$1,588,845.30, which is still 76% below their bid. It is not within the guidelines for work. We recommend not awarding it.

Director Lynch said there have been conversations with the City Manager in Whitefish and they also have a CTEP project they were bidding at the same time which was way over the Engineer's estimate and it is our understanding they are not going to award that. Their recommendation was

to bid it in November. So they do know our recommendation is to not award this project. Loran said he was informed of that also.

Project No. 5. Great Falls Urban.—IM 315. There was one bidder, United Materials of Great Falls, Inc. with a bid of \$919,249.75. The Engineer's estimate was \$927,576.00. They are about 1% below our Engineer's estimate and within guidelines for award. We recommend award.

Project No. 6. Cascade to Ulm on I-15. There were bidders. The apparent low is Riverside Contracting, Inc. with a bid of \$704,085.40. The Engineer's estimate was \$839,308.00. They are about 16% below our Engineer's estimate. We recommend award.

Project No. 7. Main Avenue in Choteau. There was only one bidder; Riverside Contracting, Inc. with a bid of \$611,687.83. The Engineer's estimate was \$526,539.00. We did have to adjust our estimate slightly when we went back and reviewed it. Our adjusted Engineer's estimate was 534,434.84, which puts it at 14% above our revised estimate. They are within guidelines for award. We recommend award.

Project No. 8. Valier-East. There were two bidders. The apparent low is Pavement Maintenance Solutions, Inc. from Columbia Falls with a bid of \$407,069.98. The Engineer's estimate was \$499,001.00. They are about 18% below our Engineer's estimate. We recommend award.

Project No. 9. Kirm Coulee – 37 km NE of Poplar. There was only one bidder; SK Construction with a bid of \$748,955.00. The Engineer's estimate was \$520,269.00. We looked at our Engineer's estimate and found a couple of items that we could adjust. The revised estimate is \$565,269.00. That still puts them 32% over our Engineer's estimate and not within guidelines for award. We recommend not awarding it.

Project No. 10. Snowfence—North Trask Interchange. There were two bidders. The apparent low is Western Traffic Control, Inc. in Missoula with a bid of \$111,248.00. The Engineer's estimate was \$130,480.00. They are about 15% below our Engineer's estimate. We recommend award.

Project No. 11. Signing/Guardrail – Flathead County. There were two bidders. The apparent low is Omo Construction, Inc. with a bid of \$147,834.94. The Engineer's estimate was \$167,902.00. They are about 12% below our Engineer's estimate. We recommend award.

Project No. 12. Rock Creek – West of Philipsburg. There was only one bidder; Hall Construction Services in Belgrade with a bid of \$88,075.10. The Engineer's estimate was \$86,066.00. They are about 2% above our Engineer's estimate and within guidelines for award. We recommend award.

Commissioner Howlett moved to award Projects 1, 2, 3, 5, 6, 7, 8, 10, 11 & 12; and not award Project 4 and 9. Commissioner Espy seconded the motion. All five Commissioners voted aye.

The motion passed unanimous.

Agenda Item 2: STIP 2007-2009

Gary Larson, Project Analysis Engineer from MDT Planning addressed the Commission.

As part of the attachment to the Agenda I sent out was a list of proposed project. From the time that I submitted that list to you to today, I was asked to add another phase to the Billings list, which was some PE for Lewistown Railroad Acquisition of Right-of-Way. They discovered they needed some PE to do the design of this Right-of-Way Acquisition. It is only around \$25,000.00. I have an additional sheet that I will hand out and I ask that you replace your District 5, Engineer Phase list with this particular list. It is a minor amount that we will be adding to the list – Control No. 6441, Railroad Corridor Preservation – Lewistown. That is the only change.

He gave an overview of the STIP and explained what it means and why it is necessary. STIP is a federal requirement that we are obligated to do. We need to complete that and get it to the Commission for your approval so that it can be submitted to FHWA and FTA. We need to get their approval and concurring in this document so that we can obligate federally. Without their concurrence and without the STIP you can't advance any phase of any project. It is important. About one month ago I sent you a copy of the draft STIP, that document covered all phases of construction, PE, Right-of-Way, IC, and CM that we are going to do for a three-year period from 2007-2009. We do this document every year. We are required to do it every four years, but we do it every year to keep track of projects.

Please keep in mind when you look at the STIP that really 90% of what is in this document the Commission has already approved in other actions previous to this date. The only things that are new is the proposed projects which generally consist of PE and then we have one other category called "the other phase" – that would be studies and those kinds of things. Those items are what you will be approving here today. But we also need you to approve the entire document.

One of the primary functions of the STIP is to get public involvement. That is why I distributed it to you a month ago. At the same time we sent out 800 copies of that document to the public, contractors, governmental agencies, county commissioners, and requested their comments on the document. We have received several comments and we've addressed those comments and they will be incorporated in the final STIP. Those comments in most cases were not substantive to the document itself, i.e., grammatical errors, misspelled word, etc. As far as removing projects, there really isn't anything that requires that in the document. Page 14 of the document proves that we have not exceeded our obligation authority. We have to do that as a requirement to the Federal Highway Administration. You will see that the document covers every phase of the project development of all the programs we have within the Department that are Transportation related. He encouraged the Commissioners to look through the document when they had a chance; you will see that we are spending federal aid on every project we are working on.

Commissioner Howlett asked if this need approval for this year or does this go to approval in November when we do the Red Book. Gary stated the Commission needed to approve it today. Director Lynch said the Commission does this every year so that when we go to the Red Book next year, then they will come back in June with another STIP to approve. Right now it is a three-year document, but next year we will probably move it into a five-year document so we can match the TCP. Director Lynch asked if this was the same document they have with the exception of a couple of items. Gary said that only one item was added -- \$25,000 in PE. This document has pretty much been approved by the Commission before this date except for the proposed projects and the other phase. That is probably the meat of what we are asking you to approve today besides the overall STIP. Staff is recommending that you approve the STIP as presented and you approve adding the new PE projects and the other phase. Once the Commission has approved this the Director will sign a letter that will go to the FHWA for their concurrence, then once we have that we will review programming projects and the program will start to move on.

Deputy Director Currie asked Ted Burch if FHWA was on board with everything the Commission was doing today and if they were satisfied with it. Ted Burch said FHWA had already looked at it and provided comments. Gary said they received FHWA's comments last Friday and those comments have been addressed.

Ted Burch said one of the changes this year is the importance of June 30th this fiscal year. SAFTELU made some changes to the planning process. One of which requires the STIP be a four-year document. In the past they have always been a three-year document. The effective date of the new planning regulations is July 1, 2007. The planning department has been trying to get this STIP completed before June 30th because after July 1st there can't be any changes made to it other than minor administrative changes -- essentially changing dollar figures on current projects; you can't add any projects. That is why it is important to get this document approved prior to the end of June.

Planning is in the process of redoing our Transportation Plan and I think our deadline for the consultant is September 1st. It is my understanding that is on schedule and it may even get done sooner. I can tell you that Planning has taken extreme measures to ensure that this document is all inclusive. I met with all the Districts and went through their projects and established whether it needed to be in the STIP and even what phases needed to be in the STIP. I feel pretty confident saying that the STIP is pretty accurate. Any project that we are going to have to move forward in the next three years is probably going to be in there. With that said, we will be able to amend after September, so if we encounter a bridge collapse and we have to put it into the STIP, we will be able to amend that after the 1st of September to be able to include that sort of thing in the STIP.

Director Lynch asked if they had a bridge collapse in August, what would need to be done. Chairman Kennedy said we could deal with the emergency issues; that would be considered an extreme measure. Gary said with the new STIP you wouldn't be able to add any new PE, right-of-way, construction, or utility projects. In other words, if you had a construction project going in December and you don't have utilities already approved in STIP, you couldn't authorize utility relocation for that construction project until the new STIP is produced; after the Long Range Transportation Plan is approved and it is SAFTELU compliant and the STIP is developed from that.

Commissioner Espy asked Gary to explain exactly where projects had to be to get into the STIP. Gary said that any and all projects that we want to start work on have to go through the STIP process. Commissioner Espy asked about utility work. Gary said it has to be in the STIP before you can begin work on that particular phase. If you are going to work on any phase of any project, it has to be in the STIP first before we can program it and ultimately fund it. Commissioner Howlett asked if the PE phase was segregated from construction in the STIP. Gary stated that PE was separate. Chairman Kennedy asked if PE was pulled out of the total project. Gary said yes; but it is not in the Red Book yet. If you look in the document, i.e., under Billings you will see proposed highway projects (page 7), that is really PE. Right-of-way Stage 2 is also in there.

Gary explained that a lot of people think this document is for tracking projects, but that is not true. The TCP tracks projects for construction; this project is a picture in time -- it is what we plan to obligate the funds for in those phases. So you might find a project that was programmed for PE

last year and they finished the PE phase but haven't moved into the right-of-way phase. If that project has not moved into what's been obligated for right-of-way, it won't show up in this document because we've already obligated the funds. Deputy Director Currie asked if the STIP has to be fiscally constrained. Gary said yes. Deputy Director Currie said then contained within our STIP is the necessary work to obligate all of our regular apportionment? Gary said yes. Deputy Director Currie said then August comes and we ask for redistribution and we receive \$18 million again, which has to be obligated within 60 days so presumably those projects wouldn't be in the STIP, so how do we deal with that? Gary said the STIP in this case is a three-year document and it is fiscally constrained over three years. You can move projects within the first two years. For example if you have a project programmed for December 2007, which is fiscal year 2008, you could pull it and still remain fiscally constrained. You wouldn't have to do a STIP.

Commission Espy moved to adopt the staff recommendations as Gary Larson presented approving the 2007-2009 STIP. Commissioner Griffith seconded the motion. All five Commissioners voted aye

The motion passed unanimous.

Agenda Item 3: Outdoor Advertising Appeal

Chairman Kennedy recused himself from the hearing and appointed Commissioner Espy as the Chair. Commission Espy convened the hearing at 10:00 a.m. on June 5, 2007; in the Commissioner's Meeting Room in Helena, Montana, at the Department of Transportation Building. She called the hearing to order and thanked everyone for coming and being on time. We are here today concerning the order of MDT's Motion for Summary Judgment with Grant. That is the purpose of the hearing today. At this time I would like to take the opportunity to have all of you introduce yourselves.

Introductions:

Commissioner Nancy Espy, Vice Chairman
 Commissioner Rick Griffith, District 2
 Commissioner Dee Winterburn, District 3
 Commissioner Kevin Howlett, District 1
 Dave Ohler, Legal Counsel
 Nick Rotering, Former Legal Counsel to the Dept. of Transportation
 Carol Grell Morris, Legal Counsel for MDT
 Joe Mazurek, Legal Counsel for Lamar Outdoor Advertising
 Heidi Goettel, Legal Counsel for Lamar Outdoor Advertising
 Paul Dennehy, Lamar Outdoor Advertising
 Rick McAlmond, Lamar Outdoor Advertising
 Ted Burch, FHWA
 Christina Davis, Senator Max Baucus
 Loran Frazier, MDT Engineering
 Jim Currie, Deputy Director for MDT
 Jim Lynch, Director MDT
 Charity Watt Levis, MDT
 Lori Ryan, MDT

Commissioner Espy went over the following rules. Rule Number One is that we will give each side 30 minutes. Then if there is a short rebuttal to answer questions that have come up, we will allow time for that. We are going to keep this on a very tight time schedule. She directed Lori to act as timer. With that we will start with Lamar.

Joe Mazurek – Lamar Outdoor Advertising

I am a lawyer with the Crowley Law Firm in Helena, and I'm counsel for Lamar this morning. We are very appreciative that you timely scheduled this argument. We appreciate that very much. The other thing I would personally like to say is to express our high regard for Tim Reardon and his professionalism and his ethics. We appreciate his caution in seeking new counsel for the Commission on this matter. In doing so he protected the integrity of the process by making sure that it is not even an appearance of impropriety around this Commission's consideration of Lamar's appeal.

At its core the Appeal pending before you today is whether or not Montana law allows Lamar to update one of its existing signs to take advantage of significant recent improvements in scientific knowledge. I submit to you that Montana law does permit upgrades. In considering that the core issue today, we are asking you to make changes to the Hearing Examiner's Findings of Fact, Conclusions of Law, and the Proposed Order previously issues in this case.

I hope my job today will be fairly simple because the legal and factual issues in the case have been extensively briefed by both sides. As a result, I will try not to unnecessarily repeat the issues raised in the briefs but will highlight a few of the more important issues. I am also happy to answer questions that you might have about the issues raised in this case.

The first two issues I will address were raised in the Department's Reply to Lamar's Exceptions. The first centered on whether Lamar was prejudiced by the Hearing Examiner raising a new issue at oral argument and the second centers on the Hearing Examiner's role as a "fact finder" when considering Motions for Summary Judgment.

First the Department suggested Lamar was not prejudiced by the Hearing Examiner unilaterally raising a new issue because Lamar and the Department found out about the new issue at the same time. This contention completely ignores the new issue clearly favored the Department. Throughout Discovery in the first six Summary Judgment briefs, the Department contended that the issue in this case was not whether or not the absence of a rule authorizing LED signs constituted a prohibition against such signs. In so arguing the Department conceded that nothing in the existing statutes or rules prohibited the signs. However at oral argument the Hearing Examiner completely ignored those issues and suggested that Section 75-15-113(4), MCA, prohibited LED signs. As pointed out in Lamar's Supplemental Brief by raising the new issue, the Hearing Examiner allowed the Department to completely reverse the position it had taken throughout the Discovery and the earlier briefing in this case. While both sides may have found out about the new issue at the same time, the creation of the issue by the Hearing Examiner clearly favored the Department.

The Department argues that the Hearing Examiner properly raised a new issue at oral argument on Cross Motions for Summary Judgment because nothing in Montana law prohibits a Hearing Examiner from considering all relevant legal issues in a case. However nothing in Montana law allows a Hearing Examiner to require parties to brief on summary judgment issues that have not been raised on their own. Moreover, Montana law explicitly prohibits a Hearing Examiner from allowing one party to completely change position in the litigation to the prejudice of the other party. In this case the Hearing Examiner did not just raise a completely new issue; she raised an issue that the Department had already conceded in the Administrative Proceedings.

The Department has argued that Lamar was free to argue that Section 75-15-113(4), MCA, did not apply at any time in the proceedings but it did not. However, not only did Lamar raise this issue but the Department had conceded that the statute did not apply. As a result, the procedure by which the Department was allowed to change positions regarding the applicability of Section 75-15-113(4), MCA, was improper.

Second the Department contends that the Hearing Examiner appropriately weighed the credibility of Mr. Hurley's Deposition testimony in reaching her determination of the facts established for Finding of Fact No. 8, which dealt with the statute we have been talking about Section 75-15-113(4), MCA. However, this contention ignores the Hearing Examiner role regarding Summary Judgment. Montana Department of Transportation replied to Lamar's Exception citing that exception in the briefs filed by the Department.

The Department suggested the Hearing Examiner was entitled to ignore Pat Hurley's statement that Lamar's did not violate Section 75-15-113(4), MCA; however that is not the standard that governs Motions for Summary Judgment. A Motion for Summary Judgment is what you would ultimately discuss and rule on. It is important to recognize that Hearing Examiners role is only to determine what facts are disputed and not to weigh the credibility of evidence. That is what we are concerned about here – that the Hearing's Officer was looking at the weight of the credibility of the evidence and not determining what the facts are that you will make your decision on. That is very important. The Hearing's Officer is charged with determining what the facts are and you decide them against the law and make your decision.

In reviewing the Hearing Examiner's Finding of Fact, this Commission may reject or modify the Findings of Fact if it determines from a review of the complete record and states with particularity that the Findings of Fact were not based upon competent substantial evidence or that proceedings on which the Findings were based did not comply with the essential elements of law (Section 2-4-621(3), MCA).

In this case, the Commission must reject or modify the bulk of the Hearing Examiner's Findings of Fact. The statements in Finding of Fact No. 8 not only contradict the evidence in the case but violate the Hearings Examiner's duty relative to a Summary Judgment Motion. Finding of Fact No. 8 relies on the testimony from Mr. Hurley regarding whether Lamar was required to seek a permit to upgrade the sign on the LED face. It has nothing to do with his understanding of the definition of the sign face. In fact in his Deposition, Mr. Hurley clearly testified that the Commission's Rule 18.6.202(11) defines the sign face for purposes of the rules as the physical face of the sign structure rather than the advertising message. Moreover later in his Deposition at lines 3-16 of page 104, Mr. Hurley, stated emphatically twice that Lamar's signs did not violate the statutory prohibition against two faces. Despite these unequivocal statements the Hearing Examiner cites "Statements from Mr. Hurley's Deposition in which he was discussing his interpretation of a rule completely unrelated to Section 75-15-113(4)".

The Hearing Examiner's Findings of Fact No. 8 misstates the undisputed facts in this case and reaches a factual finding completely unsupported by the record in this case. In light of Mr. Hurley's Deposition testimony, the only disputed facts are that the Lamar sign did not violate Section 75-15-113(4), MCA. It was inappropriate for the Hearing Examiner considering Cross Motions for Summary Judgment to raise new issues and even more inappropriate to ignore clear

factual statements in favor of ambiguous ones. As a result the Commission must reject or modify Finding of Fact No. 8 on the basis that it is not supported by the undisputed facts in this case.

As a point of clarification Lamar accepts the Findings of Fact No. 8 and Conclusions of Law 11-19. The Department's response correctly noted a discrepancy between the first page of Lamar's Exceptions and the remainder of that document. The omission of some of the Conclusions of Law on the first page was an editing oversight on our part and we apologize for that confusion but we think you can work your way through that.

For purposes of our argument today, we want to focus on Conclusions 17 and 18. Conclusion of Law 17 first determines that each advertisement on an LED sign will be a separate face for purposes of Section 75-15-113(4), MCA. Lamar's legal arguments regarding this Conclusion are set forth in detail on its Supplemental Briefs and I will not repeat them here unless the Commission has specific questions. Our portion of the Conclusion regarding the number of advertisements visible to a particular traveler are not addressed in as much detail and bears some discussion this morning. The Conclusion states that without any administrative rules in place regarding in particular minimum display time, Lamar's LED board would display in sequence or in succession more than two faces or advertising images visible and readable from the same direction by a traveler traveling on the highway toward the sign. This Conclusion is completely unsupported by any facts in this case. Lamar has yet to determine the length of time that a particular message would be displayed and there would be no information presented by either party as to the time that the sign would be visible to a driver approaching that sign. As a result it is impossible to determine whether more than two advertising messages would be visible to a driver even if the Commission determined that the applicable statute limited the number of advertisements that could be reviewed by a particular driver.

As outlined in Lamar's Exceptions, Conclusion of Law 18 raises another new issue about whether legislative purpose of promoting safety and aesthetics requires denial of Lamar's permit. In this case the Department has made no suggestion that LED signs violate legally binding safety or aesthetics standards. Further they give utter lack of meaningful regulation of existing traditional outdoor advertising signs and the gaudy and flashy on-premises signs along Montana's highways. Such an argument would be incredulous. Montana does not currently regulate the number of messages displayed on outdoor advertising signs nor has it attempted to limit or regulate in any way those bright flashing on-premises reader boards that have proliferated along Montana's highways in recent years. In fact, there is no dispute that Lamar could place as many paper advertisements as it wanted on its existing sign in the Billings Heights location. As a result the suggestion that safety and aesthetics require a particular interpretation of a term sign face simply does not hold up.

Members of the Commission the simple fact of this matter is that nothing in Montana law prohibits Lamar's proposed upgrade to an LED sign. In the absence of such a prohibition, Lamar's proposed upgrade should be granted. In the absence of a prohibition, the Department's denial of Lamar's permit was improper. We ask that you reject the Hearing Examiner's improper Findings of Fact and Conclusions of Law and that you adopt a revised Order granting Lamar's Motion for Summary Judgment.

Questions: Commissioner Espy asked if there were any questions of Mr. Mazurek. No questions were asked at that time.

Carol Grell Morris – Representing the Montana Transportation Commission

My name is Carol Grell Morris. I'm an attorney with the Department of Transportation. I worked on this case with Nick Rotering who is present here today. Nick Rotering retired two weeks ago and was kind enough to attend our hearing this morning to help with any arguments that he may have dealt with before I joined the case.

Mr. Mazurek has correctly limited his argument to those he felt were most compelling for you this morning because he is aware, as am I, that you have the record. You've been able to go through it and read all the briefs and statutes and rules, therefore we don't really need to repeat them. You are able to read and comprehend and certainly if you have questions all of us are available to answer them. Mr. Mazurek in bringing his argument this morning has once again taken us in a new direction. Because Mr. Mazurek is now telling us that the Findings of Fact in general are not acceptable to Lamar, which is contrary to what he argued in his Exceptions, which was that only Finding of Fact No. 8 was at issue. That is something we need to explore and I will get into that in a moment.

In addition Mr. Mazurek is now telling us that Conclusion No. 17 & 18 are the key to overturning the Hearings Examiner's Order as he urges you to do, whereas his Exceptions argue that 11 through 19 were incorrect Conclusion of Law. So it leaves us in a difficult position to try and know exactly which item Lamar is unhappy with. Knowing that, I think we should go over what we have in both the Exceptions filed by Lamar as well MDT's Reply to those Exceptions to try and remind us all what the arguments are that the Commission should be deciding today.

Again, not wanting to unnecessarily repeat, we need to orient ourselves that basically the case is about Lamar Outdoor Advertising applying for a permit to upgrade an existing sign. The sign is located in Billings, in the Heights, and it has been permitted for a number of years. Lamar's application proposed to convert that to an electronic billboard. I'm sure you have all gleaned this from the facts already but just to remind us what we are actually talking about today. The Outdoor Advertising Control Section, whose Administrative Officer is Pat Hurley, denied that permit, and we'll be discussing Mr. Hurley's Discovery and his Deposition a little later. So that actually forms the basis right there, those few sentences, for our case here today. The application was denied.

Lamar appealed that as they certainly have the right to do under the Administrative Procedures Act. So a Hearings Examiner was appointed. Now I'm sure you saw reference to her name in quite a few of her materials. She is with the Department of Justice and her name is Pam Collins. She became the Hearings Officer in charge of the case, so everything went through her from that point on after she was appointed. Ms. Collins was the one who would hear all of our arguments; if we made Motions she would rule on those motions, and you discovered in reading the record, she issued the Findings of Fact, Conclusions of Law, and Proposed Order. So her role is then concluded. That Proposed Order, the word proposed being the key here, comes to the Commission for a Final Order. She is proposing that Order. So that is what we are doing here today. Again those few sentences kind of sum up mountains of briefs and materials and your role today is to make a Final Agency Decision. Ms. Collins' Findings of Fact and Conclusion of Law and Proposed Order are the basis and you need to review what she has done in this case, but she has already sorted through all of the briefs and oral argument in coming to that Proposed Order.

Also there has been some confusion about the standard under which the Commission will be making its Final Order. As you know from your materials, the Montana Administrative Procedures Act, MAPA, are the statutes that tell you how you should decide the case and make your Final Order. We have lots of materials that point you to the correct statutes and you've been provided copies of those. But basically your role today is to review the record and make your decision to either adopt the Proposed Order as it was presented to you, to change the Findings of Fact if you've reviewed the complete record and can state with particularity which Finding was not based on competent substantial evidence, or if necessary modify or reject the Conclusion of Law based on any change you made to the facts. Again we have the statute available; it is available to review so we can see what exactly you are charged with doing today. That is a very simple summary to try and distill that mountain of information that you have.

So let's go back to the case itself. The Hearings Examiner issued her Findings of Fact and Proposed Order on February 15, 2007. She first noted, and you have a copy of the Finding of Fact and Conclusions of Law and Proposed Order, that the Montana Supreme Court has allowed Summary Judgment to be used in contested cases under MAPA. Now that is a point that Mr. Mazurek sort of alluded to but did not really explain thoroughly so I thought I'd take a minute to do that. I'm not sure how many of you are familiar with Summary Judgment proceedings, but it is a way to short-cut having an actual hearing at which witnesses testify, and we conduct a mini-trial. That didn't happen in this case because Summary Judgment short-cuts that. That is the procedure in which the attorneys argue these are the facts, they are not in dispute, and the law as applied to those facts, means that we prevail. Both sides filed such a motion. So interestingly enough we had Cross Motions for Summary Judgment, which again is fairly unusual. Normally one side of the issue will say here are the facts and when you apply the law I win, and then the other side tries to dispute that by saying no, the facts are not as clear as that or whatever argument they want to make. But in this case both sides said with the facts we have, applying the law and the rules as we have it, we should prevail. So the Hearings Officer was faced with having to sort her way through both lines of argument. That also is why it resulted in such a voluminous record because each of those motions generates a brief and attached exhibits, then a reply from the other side, then there is a response from the other party to the reply – and you saw what that generates. So the Hearings Examiner did sort her way through all of that and she also held an Oral Argument. Mr. Mazurek has made much of that Oral Argument.

It was held in December over at the Department of Justice and both sides attended and made arguments. Now it is very similar to what we are doing here today. Since the Hearings Examiner has already read through all the briefs, it certainly isn't necessary for us to repeat all those legal arguments and it would be fairly boring if we did that. But instead we raise issues that we want her to focus on or we raise issues that she might have questions on, or we raise issues that the other side talked about in their reply because we want the last chance to argue that those are not correct. So she held that hearing in December and we all attended and argued. During that hearing Ms. Collins raised an issue that neither side had put in their briefs.

So Mr. Mazurek is arguing today that Lamar, the party he represents, was somehow prejudiced by that occurrence. But MDT has argued, as I'm sure you noted in some of our briefs, that there was no prejudice because both sides heard that issue on December 8, 2006. Neither of us had the advantage of earlier research or any type of analysis that might have gone on before. It was on that date that the Hearings Officer wanted to know about a different statute. Mr. Mazurek has argued that was improper for the Hearings Examiner to raise a separate issue at that time but that is not correct. Now it is true that when a case starts at a District Court level and it is appealed to the Supreme Court, you can't raise new issues at the Supreme Court because the

idea is that the District Court never had a chance to rule on them. So how can you criticize for ruling wrongly if they never even heard the issue? Well that is our analogy here today. This is the first level – the Administrative Hearing level at which all issues are available to be discussed, argued, and decided on. This is the Hearing Officer's chance to look at the issue and she herself can certainly raise it; she wants to look at that issue and then she will rule on it. Now if this case is appealed further, further new issues are prohibited because the Hearing Officer's Proposed Order and your Final Decision are the first chance to make a ruling on all the issues.

So Ms. Collins identified an issue that was found in a statute that talked about the number of facings allowed on a sign and she said to both myself as the MDT representative, and to Lamar's representative: "what about that issue?" Both sides at that time said we had not considered that issue; we haven't looked into it, researched case law on it, we haven't done anything on it. Ms. Collins said then I would like supplemental briefing. You probably read those in the record too. We didn't have enough bulky paper; we needed more so we did supplemental briefing. Again she has the authority to do that as the Hearings Examiner in that contested case at the first Administrative Hearing level. So we did supplemental briefing. We looked into that statute, both at the exact same time, we both started on December 8th researching that statute – was there any case law on it, were there any decisions we could rely on, maybe other States have a similar working, and we were allowed to put that in a brief for the Hearings Officer to consider. We were also allowed to reply to the other side's brief; more paperwork. So if MDT raised an issue in their Supplemental Brief, Lamar had every opportunity to dispute that and say that is not what the case law says, or we found a different case, or just flat say we don't like the way MDT is interpreting that statute, which is basically what their reply said. Because MDT argued that this electronic LED upgrade would in fact create more than two facings. The Hearings Office read that and actually agreed with that as you saw in her Findings of Fact and Conclusion of Law.

Lamar certainly has filed their own Supplemental Brief, they certainly filed a reply to MDT's brief arguing the same issues you've heard today – you can't raise a new issue, that is not correct. They were prejudiced by this, that is not correct. The Hearings Officer can't raise an issue on her own, and certainly she is able to do that and she did and was fully briefed on it by both sides at the same time. So she considered all of that paperwork and at the end of it she granted MDT's Motion for Summary Judgment and denied Lamar's Motion. Again recall they were Cross Motions for Summary Judgment – so if one of them is granted, that concludes the case – case over; final decision with the Commission. There is no further hearing where we have witnesses and everything. Again the facts are not in dispute and when you apply the law to them the Hearings Officer concluded MDT's position on denying the application was correct; MDT prevailed. She also specifically denied Lamar's Motion for Summary Judgment. So based on all of their briefing, their arguments, their exhibits, based on their supplemental briefing on this new statute, the Hearings Officer did not find that compelling enough to grant their motion. So that is where we stand today and that is my position on some of what Mr. Mazurek has raised.

More specifically, in the event you hadn't noticed, Mr. Mazurek said a couple of things today that I would like to address. He said that MDT had previously conceded that the statute which controls the two sign faces previously conceded that. That is not correct. As I mentioned earlier, MDT didn't address that statute; neither did Lamar. So it's impossible for us to have conceded that the statute didn't apply when in fact we had never addressed that statute. So I would disagree with that characterization of what occurred before the supplemental briefing was ordered.

Secondly Mr. Mazurek is arguing about some deposition testimony that was attached to some of their briefs. As he mentioned there were several depositions taken in this case, one of which was the Deposition of Pat Hurley. Just to remind you, he is our Outdoor Advertising Coordinator; he is in charge of the Outdoor Advertising Program for MDT. His deposition was taken at great length and was preserved, as all depositions are, and it was sworn testimony, as all depositions are. That means since you are under oath you can use that testimony, that deposition, in your briefs for Summary Judgment. It is evidence that the Hearings Office can look at and decide whether it is credible or whether it is not. It was sworn testimony.

So in her Findings of Fact, Ms. Collins referred to Mr. Hurley's deposition testimony. She said that based on his testimony it is MDT's position that the LED upgrade would create more than two sign faces. This was based on definitions of sign faces as the space available for advertising. It was based on definitions of facings found in the statutes. She specifically noted the page on which Mr. Hurley had said that and that is in her Findings of Facts. She specifically said that. He says on page 23 that this is more than two sign facings. So I definitely strongly disagree with Mr. Mazurek's standing here today in telling you that Mr. Hurley did not say that. Certainly he did, it is in his Deposition. And Ms. Collins was entirely appropriate to rely on that; it is sworn testimony. Lamar had argued that "he went on to say some other phrases that were not as clear." Ms. Collins had all that available to her as well, so if she felt that Mr. Hurley was not clear later, she certainly wouldn't have relied on his testimony in making her Finding of Fact. So Ms. Collins was appropriate. Mr. Hurley's Deposition testimony was clear, and that established MDT's position on whether or not the upgrade application was prohibited by that statute on two sign facings only.

So now we have MDT's position. There is a lot of argument in there that the agency's interpretation of its statutes and rules is entitled to deference. That is case law in Montana. MDT's position that the LED upgrade would create more than two sign faces is entitled to deference. The Hearings Officer specifically cited to those cases that set forth that proposition

and relied on it in saying MDT says it is a violation of the statute therefore they were correct in denying the upgrade. So all that was established in our Motions for Summary Judgment and Mr. Mazurek arguing that deposition testimony was unclear does not un-establish it; it was established. That is MDT's position – a position it is entitled to deference.

I also want to again point out that, as I mentioned earlier, but I think this is really critical for the Commission, if you look at Lamar's Exceptions, which you were provided a copy of, they specifically state in there that the only Finding they object to is No. 8. So your job today is going to be to look at these Findings of Fact and Conclusions of Law and Proposed Order and see whether you are going to adopt them or whether you feel some need to be changed and come up with a Final Order. So I think we should look at the Conclusions and what was accepted to them. That is the basis of what we are doing here today – Lamar did not like some of the Findings and Conclusions. The only Finding that is cited in their Exceptions is No. 8. If we look at their Exceptions they talk about Finding of Fact No. 8 that the existing sign is a paper sign rather than a vinyl. As MDT has stated in its reply, that is a really minor argument and in fact Mr. Mazurek didn't raise it today. The distinction between whether it is currently paper or vinyl is not the issue; it is whether or not the LED upgrade would violate the statutes. So that is pretty minor and doesn't seem appropriate as it is not prejudicial to Lamar if that remains in the Findings. That wasn't the basis for any decision further.

Their second objection to Finding No. 8 was its "characterization" that is the word they used, that they had somehow applied for an upgrade to the sign facings. That was the bulk of their argument that this statute should not have been applied. But what the Hearings Officer actually said in her Finding of Fact was based on deposition testimony. Again the Findings of Fact section has to be cited to the record. You have to say where you got that information to establish a fact and Ms. Collins did that correctly and appropriately. She says in her Finding of Fact No. 8 she cites to Hurley Deposition Testimony, she cites to Lamar's Motion for Summary Judgment and Exhibits attached to that, she testifies further to other pages of Mr. Hurley's Deposition. Again she is establishing the Fact that the upgrade would put more than two sign faces on that billboard and she had the evidence to back it up through Mr. Hurley's Deposition. That is the only Finding that Lamar excepted to. So today we are hearing that they don't like any of the Findings. I don't know where that comes from. The Exceptions except only to No. 8 and inappropriately so.

So with that being said, if all the Findings 1-11 are correct, the Conclusions of Law which are based on them are also correct. So it is difficult to understand why Lamar has only objected to Findings of Fact No. 8 and incorrectly at that, and yet somehow feels that most of the Conclusion of Law were reached incorrectly. But that is the position they took in their Exceptions.

Again looking at their Exceptions they decided that Exceptions 11-19 were not correct. If we examine that argument, let's start with Conclusions 11-14. Lamar says in its Brief in Support of its Exceptions that all four Conclusions, and I'm quoting here, are "correct statements of Montana law." Well to me that is quite significant. If Lamar says that Conclusions 11-14 are correct statements of Montana law, then why are we arguing on them? They were based on the facts which we've decided everybody thinks are correct with minor exceptions to No. 8, and Conclusions of Law are all correct statements of law and they are all correctly cited to an Administrative Rule or statute. Ms. Collins did an excellent job. Her Conclusions of Law are all supported by statute and rule. Conclusion No. 11 cites 18.6.202 which is the Administrative Rules that deals with sign faces. Conclusion of Law 12 cites 18.6.251 which talks about reconstructing signs. That was also an issue in the case so her conclusion is correct to citing to that, which said that an upgrade application was necessary because it was changing the number of sign faces. Conclusion No. 13 cited two Montana Supreme Court cases and we've discussed those before too. Those cases specifically say that when an agency interprets its own laws and rules it is entitled to deference unless you can show that there was some more compelling law or rule that overrides; that it is entitled to deference when it interprets those statutes and rules. Conclusions of Law No. 14 also cited two different Montana Supreme Court Cases which concluded that Administrative Rules are interpreted under the same principles as statutes and that had been an argument earlier in the case. So all four of those Conclusions, which again Lamar said are correct statements of law, if they think they are correct and MDT thinks they are correct, I think that they should stand.

So finally that brings to their argument on Conclusions of Law 15-19. Lamar argued that they should be rejected because these are the five that were based on that statute that the Hearings Examiner raised in the December oral argument. So that seems like it is rather key to their argument. Based on their Exceptions that I've gone over and were really not a distinguishment earlier, they really didn't distinguish Finding of Fact No. 8 and they've already conceded 1-14 are correct statements of law, so apparently we are supposed to focus on 15-19 and those are about the statute with the two sign facings that we discussed earlier. So they go on to talk about these same arguments that the issue should not have been raised by the Hearing Examiner, which we've already covered and certainly that was appropriate. They also talked about, and again I've gone over why that was not prejudicial to them because we heard it at the same time, researched it at the same time, submitted our briefs and certainly could have persuaded the Hearings Officer in our favor, either of us, but she in fact chose to agree with MDT's argument. Lamar had every opportunity to persuade her differently if they could find a law that supported that. So 15-19, we've already gone over. They are also correct. They are all also cited properly to statutes and rules. They are all interpreting the statute at issue here. And they were all based on proper

Montana law. Lamar has not raised anything that would tell us the Hearings Officer reached those conclusions in error.

Finally, their Exceptions Brief presents its Replacement Conclusions of Law 11-14. I've actually never seen that done. The Montana Administrative Procedures Act says that the Final Agency Decision; that the decision maker which is the Commission, can make changes to the Conclusions but I've never seen a party suggest what those changes should be. So that was a fairly interesting departure for me. Unfortunately their Replacements are not based on the Findings of Fact in this case, and that is the way they are required to flow. You establish the Findings with citations to the record then the Conclusions must follow from those findings. Lamar without suggesting any changes to the Findings, now wants you want to put in Replacement Conclusions that are not based on those Findings. So I would urge you to reject those Replacement Conclusions as not being properly based on any of the findings and simply a rehash of arguments already rejected by the Hearings Officer.

So the commission has the job today of determining whether the Findings of Fact, Conclusions of Law, and Proposed Order are appropriate. They have to be based on the contested case conducted under MAPA. Based on your review of the record, so the Exceptions and the Reply and today's oral argument, the Commission should conclude that the Hearings Officer's Findings of Fact, Conclusions of Law and Proposed Order are correct. I would urge that the Commission adopt the Hearings Officer's Findings of Fact, Conclusions of Law, and Proposed Order in its entirety and enter the Proposed Order as the Final Order in this case.

Thanks for your attention and I'm available for any questions you might have.

Rebuttal

Heidi Goettel, I'm an attorney with the Crowley Law Firm, and I've worked with Mike Green on this case. I would like to respond to a couple of things that were brought up. First Carol is correct that the Commission can either reject or adopt the Conclusions of Law that the Hearing Officer has come up with. We again ask that you reject certain of those Conclusions of Law. She is correct that we do object to Finding of Fact No. 8, not primarily because of the distinction between the vinyl wrap on the face and the paper covering on the face but because Finding of Fact No. 8 says that Lamar was trying to change the number of sign faces on the sign and we dispute this. Lamar's position is that the number of sign faces would remain the same. Messages on the sign can change and more frequently than other current technology but the number of sign faces remains the same.

Our problem with the Proposed Order is that it does not make Findings and Conclusions on the issues that were central to this case to begin with. The central issue to this case is whether MDT's original grounds for denial are valid or not. The original grounds for denial that were stated all along that was argued prior to the last oral argument was whether the lack of specific rules governing LED sign faces above and beyond the rules that are in place that govern all signs meant that those sign faces should be prohibited or not. These Conclusions do not address that; they address a new issue that was improperly raised and we discussed why that was improper for that to be raised. That issue is whether or not there is more than one sign face. The big problem with that issue is that there is no Discovery on that issue. We started this case through the Discovery process with Interrogatories, Request for Admission, and Deposition. A factual basis was laid in this case and at that time this statute was not at issue, so no factual basis was laid. The only reference to this statute in the depositions at that time is Pat Hurley admitting that this statute did not apply. I think it is important to look at that section of the deposition because this is the factual record that we have. You can reject the Conclusions of Law because they are not based on competent evidence. And they are not because there is no factual evidence on this statute. I will read the portion of that Deposition. Mike Green did this Deposition, he is asking Pat Hurley about this specific statute [Section 75-15-213(4), MCA]:

Q: (Mike Green) Are there more than two facings?

A: (Pat Hurley) No.

Q: (Mike Green) And that is even with your understanding of facings that we've discussed with the different advertisements? This is referring to the earlier part of the deposition where they are talking about a separate regulation governing the permit application itself that talks about facings. That is where the discussion that is cited in the Finding of Facts that you have comes from. This is later in the deposition.

A: (Pat Hurley) Are you asking if they could have two different types of advertisers up there? Is that what you're asking me?"

Q: (Mike Green) No, I'm just asking you the statute. The statute says you can't have more than two faces.

A: (Pat Hurley) That's correct.

Q: (Mike Green) Would you agree with me that there is not more than two facings in this?

A: (Pat Hurley) Yes.

Q: (Mike Green) Proposed sign?

A: (Pat Hurley) Yes, there are not more than two faces on the sign.

At this time during Discovery this was not an issue; it was later raised and there is not factual basis in the record to argue over it. So we object to the Conclusions of Law in part because they don't address the important issues that we briefed and did Discovery on before the issue was raised by the Hearing Examiner. That is why raising that issue at that time prejudices Lamar. It was raised at the same time for both parties but it obviously benefits the department. The Hearing Examiner didn't just raise a new; she raised argument and that argument was for MDT. She didn't just agree, as Carol said, with MDT's argument and adopt their position; she made the argument for them. An argument that they hadn't previously made that wasn't the basis for the denial. So the factual basis for the Findings should be based on facts that were revealed in Discovery and since there was no Discovery on this issue, there are no facts. So you can reject the Conclusions that there are more than two faces.

More importantly than looking at the Findings of Fact that are here and saying that we agree to all those, is that we don't agree to the omissions of Finding of Facts that should have been in there and that aren't. The Hearing Officer is really a neutral fact finding and adjudicator; she shouldn't really be arguing or advocating for one side or the other. We did that during our briefing and the Discovery.

Also I want to address that there are limitations on the deferences given to a state agency decision and the case that supports that decision is outlined in our Supplemental Brief.

Rebuttal

Carol Grell Morris. Again a very brief reply – all that Heidi has raised for you here today was available to Lamar to argue to the Hearings Examiner. All those quotations from the Depositions were available to Lamar. All of them were available to be cited to persuade the Hearings Officer that that was MDT's position. None of them were persuasive; none of them were fact cited. So it is odd that they now raise it at this time. Instead the Hearings Officer's decision was a legal argument. Pat Hurley is not a lawyer; he was not making a legal argument in his deposition. The Hearings Officer was. She looked at all the arguments, the case law, the statutes, and she decided that MDT's argument that the two sign facing statute had been violated was the correct legal argument. A citation to a deposition which is factual testimony at best and not as clear as Heidi would have you believe, is not the legal argument. So the Hearings Officer was correct in her interpretation of the legal arguments in this case.

Questions by the Commission

Commissioner Winterburn asked Carol Morris if she could quote the part where the Hearings Officer went back to Hurley's testimony about the two sides. Could you give us the place where that happens? What we are arguing here is whether Hurley denied this permit on the idea that it was not two sides and their contention is that he said it was two sides – so if you could find that exact spot for us it would be helpful for us to look at that. Carol Grell Morris said they could find it on page 5 of the Findings of Fact and Conclusions of Law. Starting on line 14 of page 5 it says: "Hurley's understanding of the rule was that each different advertisement was a separate face." The citation in parenthesis the Hearings Officer has cited to Lamar's Motion for Summary Judgment, Exhibit C, Hurley Deposition at page 10, lines 25-27. So a copy of that actual deposition is also attached in the materials, so if you want to go to page 10, lines 25 to 27, that will give you the language that the Hearings Officer was relying on when she established that as a fact. I believe the deposition is in your materials.

Heidi Goettel pointed out that the discussions about sign facings were taken out of context and the section. To provide context could you also please look at page 103 & 104 of the deposition when you are re-reading that. That is why Mike referred back to the section. I think that provides the whole context about faces, messages, and advertisements and what Pat Hurley's position was.

Commissioner Winterburn asked Carol Morris on her citing of Hurley's Deposition, was that page 10 of the Deposition? Carol Grell Morris said yes, of the Original Deposition. She explained she got that from the Hearing Officer's citation. Commissioner Winterburn said that cite was not correct. Carol Grell Morris said she believed the Hearing Officer meant pages 25-27 of the Deposition; that is the material I have reviewed and that begins with line 14 on page 25. Then there is a discussion about what the rule requires on then moves onto page 26 and they take a break to find the rule, and finally continue on page 27, line 5, the question was "so you're changing the position of the existing faces" and Pat Hurley's answer was "yes you are going from two, from a double face you are creating an LED that is going to show several faces." Then it goes on to interpret that rule further.

Heidi Goettel asked the Commission to continue reading to provide context for those statements, read page 97 of the Deposition where Mike Green clarifies what regulation they are referring to and later page 103. ... (inaudible) ... There is more context than each line says and if you could look at each place where he discusses this. Also Lamar's Supplemental Briefing outlines both those discussions and talks about sign faces and the physical structure of sign faces and refers to those discussions in whole and how they work together. Carol Grell Morris said all of which was available to the Hearings Examiner. Heidi Goettel said yes.

Commissioner Griffith asked Mr. Mazurek is he was adding additional Exceptions to your original document. My question gets back to the point that you talked about with the Montana Administrative Procedures Act where you said that because the Summary Judgment was not allowable in the Montana Administrative Act. Mr. Mazurek said the point he was trying to make was that the Hearings Officer can't talk about Conclusions of Law. She has to find facts. That is what I was trying to make clear to you – that she was getting beyond that. Commissioner Griffith asked if he was questioning her right of Summary Judgment. Mr. Mazurek said no, the Commission has the right to Summary Judgment; she just drafts the order that is supposed to provide facts for you to look at, and that is what we've been trying to do there today. We weren't adding any new things. Commissioner Griffith asked Mr. Mazurek if he was saying there are disputed issues of fact and that this is not an appropriate Summary Judgment. Mr. Mazurek answered no.

Close of Hearing

Commissioner Espy said since there is no further discussion; I would like to thank all of you for your excellent information and education. We will recess and discuss what we have heard today and we will have a Finding at a date within the next 30 days and as early as we possibly can so you will know. I'm sure it won't take too many days or hours for us to come to some conclusions. Thank you very much for all of your kind attention and your good remarks today. At this time, 11:05 I will close this hearing. Thank you.

Commission Discussion

Commissioner Howlett asked if everyone was prepared to discuss this issue today or if they needed time to continue thinking about the arguments that were presented. Commissioner Espy did not believe the Commission could look at a new fact. Carol Grell Morris asked if the discussion would be open to the public. Commissioner Espy said yes the discussion was open to the public and they were welcome to stay however that did not mean the Hearing was re-opened. She stated they may not be coming to a decision today and they would be listening to the advice of their attorney.

Commissioner Winterburn said they had discussed before that the whole crux of this situation is whether or not these signs had two sides and if the changing of the signs creates a different sign face and whether or not the denial of this permit was appropriate. The discussion with Mr. Hurley seems to be the most viable place we need to look because that is at issue here. I don't know, I'm just questioning this. Commissioner Howlett said that he found the presentations to be very informative however he did not think they were persuasive in the sense of changing his view of the Order presented by Hearings Examiner. I was entertained by the suggestion that the Hearings Officer lacked certain kinds of authority. He said it was clear to him from the discussion with counsel that they have some pretty broad authority at the hearings officer level to introduce the kinds of things that present a broader scope of fact. He felt the question finally asked toward the conclusion of the meeting about the disputes of fact in question answered itself. So I'm not persuaded by the arguments today that we should reject any Findings of the Hearings Officers.

Commissioner Griffith asked that the Commission's options be repeated. Dave Ohler said that the first thing the Commission could do was to accept the Proposed Findings, Conclusion of Law, and Order as presented by the Hearings Officer. The second thing you can do is decide that a Finding or Findings of Fact are not supported by substantial evidence in the record. But to do that requires you to review the entire record. With respect to the Conclusions of Law, you can decide that the Conclusions by the Hearings Officer are a correct interpretation of the law or they are not a correct interpretation of the law. Finally you can amend the Proposed Order if you think it is appropriate based on the Findings.

Commissioner Griffith moved to adopt the Hearing Examiner's Findings of Fact, Conclusions of Law and Proposed Order in their entirety and have the Final Order drafted pursuant to that. Commissioner Howlett seconded the motion. All four Commissioners voted aye.

Motion passed unanimous.

Congressional Report

Kristina Davis addressed the Commission: Madam Chairman and Commissioners I want to report on two of the technical changes that we've been working on in the U.S. Senate for MDT. The first is Hwy 323, Ekalaka-Alzaka. Senator Baucus was out there last week. Basically we currently have a House earmark which is the only House earmark that we have for this State. The earmark is supposed to help fund some of the construction throughout Montana. Traditionally we borrow earmarks against earmarks to get projects done as long as they all come out even in the end. However you can't borrow a House earmark against a Senate earmark. So the technical change is to try and get the language changed so that it would read as a Senate earmark so that we can borrow against it.

Basically, as the Senator explained it to me, there are four boxes – the Democratic Senate, the Republican Senate, the Democratic House and the Republican House. Because the earmark started with Senator Rehberg, it started out of the Republican House box, therefore it needs to

originate out of that House even though we have originated it. So we are asking Congressman Rehberg to work with us on that. He has in the past indicated that the MDT should borrow against it for highway projects but that would be disruptive and jeopardize the other projects. So we are pursuing working with his staff in trying to work out another arrangement so that we can get this earmark marked as a Senate earmark so we can borrow against it. Commissioner Espy said they were very pleased to hear that and noted that Max Baucus was in Broadus last week. He told her that he would be working very hard to get this money and get the road finished.

Kristina Davis asked if he had visited with her about the NAFTA highway. She said he was continuing to receive questions and I know MDT has worked very hard to alleviate the myth that there is this huge highway going through the eastern part of the State. At one time Sandy Straehl helped to trace the origin of it to a newsletter. It continues to be a burning question in the eastern part of the state that there is this four-lane huge highway coming from Mexico to Canada. Commissioner Espy said the rumor came from a Texan who told about this. Commissioner Griffith said you can get all the way from Mexico to Arlee on Highway 93 and he had driven every mile of it from the Mexican boarder to Canada. You think Hwy 93 is bad in Montana; there are some places in Nevada that are awful. Deputy Director Currie said Montana has the nicest stretch of Hwy 93. Commissioner Griffith said he drove it in the spring but ran into a heavy snow in Nevada. He said he wouldn't do it again. Commissioner Espy said going back to your concern that eastern Montana has regarding a super highway, it didn't help that the Teddy Roosevelt Roadway came through and then North Dakota is building a big four-lane highway to our state line. So naturally people in Glendive and others places are saying this isn't fair; they are going to start in Texas and they are going to bypass Montana. They are coming right through North and South Dakota and this is not right; this is just government doing this. Kristina Davis said she is still getting those calls every now and then on this issue. Commissioner Espy said she had a trucker friend who sent her a big article on it. When I first heard it I told Sandy about it and she researched it and could find nothing on it. It is just rumors and has been exaggerated. I tell a lot of people that but they don't believe it, they really think it is true. Director Lynch said one of the origins of the rumor was actually a Spanish company that came into Texas and was looking at ways to enter the public/private partnership segment. One area they were looking at was building a private highway which was not with federal or state money, but private money for a private roadway on private property from Mexico City to Texas. Then it grew from there. Commissioner Espy said everybody added a little something to it. People are seeing on the news that the Texans are demonstrating that they don't want the toll road that Spain is going to build, so it gets very complicated. I read something that said it was a mistake to try and run down a rumor. Most people don't know it, so you are spreading the rumor yourself by trying to find out where it came from.

Commissioner Espy said everybody really appreciated Max making that trip down through eastern Montana. We had a great time and everybody had free hamburgers and lots of questions. A lot of the questions were about Methane and other good questions, and he is very diplomatic, he asked for a show of hands for those for it and those against it. Then he said this was something both sides needed to take care of in their own state. He is very down to earth.

Kristina Davis said she was down in Cooke City for the opening the Beartooth Highway. People in Cooke City and Red Lodge were very thankful and very happy and excited that it is open. We also have a technical correction riding on that. The word I've gotten is that they have scored the provision and indicated there was a cost associated with the technical correction that we had submitted and technical's can not cost anything. So they asked me that a certain amount of highways authorizations won't be used when they do an initial baseline analysis, therefore allowing money to do something totally different, i.e., snowplowing instead of the construction. Construction is a scorable event and therefore it scored against this technical correction. One of our staffers in Senate Finance said that he is working with Boxer's people and they have assured us they will take care of the Beartooth specific change. Jim Currie is going to help me work with the language to make sure we get that in. We are pretty comfortable that that will happen, but it may not happen on this vehicle.

Commissioner Griffith said everybody on that side of our highway is happy, but if you continue down the highway to Silvergate, as Ted knows, the world isn't happy at Silvergate. They don't want the work that Western Federal Lands is doing and don't want it to happen and think it increases speed. Director Lynch said the technical correction actually is going to help because it was to take the remaining portion of Montana's earmark that was to be spent on that road in Wyoming and change its character to be allowed to maintain the roadway not build a new roadway. Commissioner Howlett said he understands they've already done portions of it. Director Lynch said they had. Deputy Director Currie said they have done the portion from Cooke City over the Montana boarder and they are going to let the section from Cooke City to Silvergate this summer. Commissioner Griffith said the interesting thing about this is that I think I've been over every mile of road in my district; I didn't even know this was in my district. Director Lynch said "well it is, and it isn't." The whole issue of ownership for the Beartooth Highway is no longer on the table. It has been for years and years and years but that is one thing we've been able to accomplish; the Park Service has conceded that they are going to be the ones who maintain that road. They are going to be responsible for it from Silvergate all the way to the Montana line toward Red Lodge. They agreed to take over the main road all the way from the Montana State line. The controversy that has gone on for so many years is that they have been trying to get that whole section rebuilt so that both Montana and Wyoming would step up and take responsibility

and then the Park would be out of it. Right now unless Montana and Wyoming step up, by law the jurisdiction belongs to the Park for maintenance. What we finally settled on with the Steering Committee is that Yellowstone Park and Central Federal Lands are giving up on the issue of jurisdiction and we are going to concentrate on what we have to do to get funding in order to keep the thing properly maintained and pay Yellowstone Park to do it.

And the importance of this technical correction is that there is \$12 million left in that earmark. Central Federal Lands would like to award a project down by Top of the World to build about one and half miles of that road. Meanwhile if you get above Top of the World up higher on the mountain, the pavement is falling apart up there. It is literally crumbling from the shoulder in. The Park is concerned that unless something can be done soon, the road is going to turn back to gravel up there. So what we want to do with this technical correction is three things: (1) we want to take about four years worth of that funding and set it aside so that Yellowstone Park can continue to plow and open the road while we work on a more permanent funding fix. (2) We want to take about \$8 million and do pavement rehab work up on top so that we can hold the road together. (3) Then we are going to make available one or two million to Central Federal Lands to do some retrofit on two bridges at the Top of the World. That is what we want to do and why we need this technical correction.

Commissioner Griffith asked if you added to that money \$20,000 for a police car to have its lights on all the time, then the other issue would go away. Deputy Director Currie said there is a Steering Committee that we've recently expanded that is made up of Wyoming, Montana, Yellowstone Park, the U.S. Forest Service, Cody, Red Lodge, Carbon County and the two Park Counties both in Wyoming and Montana, and Yellowstone County. We are all part of this Steering Committee, which has worked together to come up with this strategic plan on how to manage the future of the Beartooth Highway. Montana, since the 60's maintained the highway on the Montana side, so it is in good shape, so all we are talking about is what to do in Wyoming. We've already conceded to administrative jurisdiction in that section around Cooke City because we are doing speed studies down there and the Park is going to put up signs to try and slow traffic down. However there is no enforcement down there. Director Lynch said that last year they wanted enforcement so Motor Carrier Services went down there, then I got calls saying they didn't want my Motor Carrier Services pulling over their trucks. So they want it, but they don't want it so to speak. Kristina Davis said even Emergency Services are coming. They've been discussed. I attended a meeting down there and that was my first question – who goes out to help the people in accidents on that road.

Director Lynch said another important issue isn't just the plowing of the roadway it is actually opening the roadway at a set date. They don't want to get into the same practice as Going to the Sun Highway where the Park Service just decides whenever they want to to open up that roadway. Sometimes that road doesn't get opened until the end of June. Montana has always made the commitment that we will have the roadway opened by Memorial Day up to the state line and we've been pressuring the Park – they wait until the very last minute hoping mother nature will take care of it and you can't count on that. That is just being efficient, but you have to make sure it is open come Memorial Day weekend. Kristina Davis said there were a lot of commercial activities planned around Memorial Day weekend opening. In fact I was checking with MDT all day Friday because of the storms and they weren't able to announce that it was truly open until noon on Saturday. Director Lynch said MDT had it all opened and ready to go several days before that Memorial Day weekend. Then we had a snow even and closed it for two hours until we removed the snow and then reopened it again.

Kristina Davis said she asked if it was going to make difference that Senator Thomas passed away last night because Wyoming has been a barrier; they have not been cooperative in helping us work on this. Director Lynch said that since we have changed directions on this; we turned this thing on its ear last fall. It was always chaired by Central Federal Lands and the focus was always getting it rebuilt so Wyoming would take it and we were essentially stalemated for ten years because of that. So last fall we stepped up and told them it was not going to be rebuilt because it would cost \$200 million dollars and there was no money to rebuild it; if there were going to keep the highway open they would have to change the focus. We were successful in doing that. The other thing we were successful in doing was getting the jurisdiction issue off the table because that has been Wyoming's problem. Once we did that, Wyoming started becoming a player and they now Co-Chair with me and Yellowstone Park the Steering Committee. They've actually dedicated two million dollars toward some pavement work up there. So if we get the language changed, we have \$14 million that we can work with up there and Wyoming is actively helping secure that funding. They are up there right now looking at bridges and pavements to see whether or not we need to put weight restrictions up there because of the poor condition of the pavement. Those are administrative jurisdiction type things that Wyoming would never have broached before for fear of somebody saying that if they did the work the road would be theirs. Since we've been able to get that off the table, they are starting to become a player although we have run into some resistance at their Congressional level. Those are challenges but they are starting to come around a little bit.

Commissioner Espy thanked Kristina Davis for her reports and said the Commission really appreciated her bringing it to them.

Adjourned: Commission Espy adjourned the meeting.

Nancy Espy, Vice Chairman
Montana Transportation Commission

Jim Lynch, Director
Montana Department of Transportation

Lori K. Ryan, Secretary
Montana Transportation Commission